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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

NO. 1248

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

VS.

STATE OF ILLINOIS, BERNARD J. KORZEN, COUNTY TREASURER OF COOK COUNTY, TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, FOR THE USE AND BENEFIT OF BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS, WILBERT J. J. WAHLER and DANIEL W. PECYNA,

Respondents.

BRIEF OF RESPONDENT, STATE OF ILLINOIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION BELOW.

The opinion of the Circuit Court of Appeals, Seventh Circuit, in the above entitled cause is reported at 354 F. 2d 561 (1965).

JURISDICTIONAL STATEMENT.

The jurisdictional requisites are adequately set forth in the Petition.

PRELIMINARY STATEMENT.

The brief of the respondents, Trustees of Schools and Board of Education, succinctly and meritoriously set forth the position of all of the respondents herein. Therefore the State of Illinois, respondent, adopts the aforementioned brief, together with the Contested Issues and Statement of Facts contained therein.

The State of Illinois, however, being a sovereign, is by law granted several defenses which are not available to any of its co-respondents. Having adopted the brief of the Trustees of Schools and Board of Education, the State of Illinois therefore restricts its arguments and contested issues in this brief to those propositions of law which apply to it solely.

CONTESTED ISSUES.

1. Do the Federal Courts have jurisdiction of a suit instituted by a private citizen against a state where that state has not consented to be sued?

2. Is a state a proper party to a claim arising under the Civil Rights Act?

3. Can a citizen collaterally attack a decision of a state court in a condemnation suit by filing a Civil Rights action in the Federal District Court naming the state as a party defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The alleged applicable provisions of the Constitution of the United States are set forth in the Petition.

PROPOSITIONS OF LAW RELIED UPON.

I.

THE FEDERAL COURTS ARE WITHOUT JURISDICTION OF A SUIT INSTITUTED BY A PRIVATE CITIZEN AGAINST A STATE.

Eleventh Amendment, United States Constitution.

Article IV, Section 26 of the Constitution of Illinois.

Truitt v. State of Illinois, 278 F. 2d 819 (C. A. 7th Cir. 1960).

Fitts v. *McGhee,* 172 U. S. 516, 19 S. Ct. 269.

II.

THE STATE OF ILLINOIS IS NOT A PROPER PARTY TO A CLAIM ARISING UNDER THE CIVIL RIGHTS ACT.

Monroe v. Pape, 365 U. S. 186, 81 S. Ct. 473 (1961).

III.

THE PLAINTIFFS CAN NOT COLLATERALLY ATTACK A DECISION OF THE COURTS OF THE STATE OF ILLINOIS.

Kalb v. Feuerstein, 306 U. S. 433, 60 S. Ct. 343 (1940).

Higginson v. Schoeneman, 190 F. 2d 32 (C. A. D. C., 1951).

Bennett v. Hunter, 155 F. 2d 223 (C. C. A. 10th Cir., 1946).

Harvey v. *Sadler,* 331 F. 2d 337. (C. A. 9th Cir. 1964).

Puett v. *City of Detroit,* 323 F. 2d 591 (C. A. 6th Cir., 1963).

Sires v. *Cole,* 320 F. 2d 877 (C. A. 9th C. A. 1963).

Smith v. *Dougherty,* 286 F. 2d 777 (C. A. 7th Cir. 1961) cert. den. 368 U. S. 903.

ARGUMENT.

I.

THE FEDERAL COURTS ARE WITHOUT JURISDICTION OF A SUIT INSTITUTED BY A PRIVATE CITIZEN AGAINST A STATE.

The Eleventh Amendment to the United States Constitution provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

This amendment has been uniformly held to be equally applicable where the plaintiff is a citizen of the defendant state, as in the case at bar, except where said state consents to be sued. (*Truitt* v. *State of Illinois,* 278 F. 2d 819 (C. A. 7th Cir. 1960); *Fitts* v. *McGhee,* 172 U. S. 516, 19 S. Ct. 269. The State of Illinois did not consent to be sued in this cause and could not for such consent is specifically prohibited by Article IV, Section 26 of the Constitution of Illinois.

In *Truitt* v. *State of Illinois,* 278 F. 2d 819 (C. A. 7th Cir. 1960), the Court, under circumstances akin to those in the case at bar, held (p. 820) that a state may not be sued by its citizen unless it so consents. The Court went on to hold (p. 820) that the State of Illinois could not consent to such a suit under law and that therefore the Federal Courts lacked jurisdiction of such a suit.

In applying the precedent set forth in the *Truitt* case to the case at bar, it is apparent that the petitioners could

not sue the State of Illinois and that the Federal Court was without jurisdiction of the cause.

II.

THE STATE OF ILLINOIS IS NOT A PROPER PARTY TO A CLAIM ARISING UNDER THE CIVIL RIGHTS ACT.

The petitioners instituted this suit as an alleged violation of the Civil Rights Act (App. 9-22). In *Monroe* v. *Pape,* 365 U. S. 186, 81 S. Ct. 473 (1961), this Court held (p. 187) that a municipality is not a proper party under the provisions of the Civil Rights Act.

As in the *Monroe* case, the case at bar is a suit by private citizens against individuals acting under color of law and a governmental body; the State of Illinois. Surely if a creature of the state, a municipality, is held to be an improper party to a civil rights action, the State itself is an improper party.

In the *Monroe* case this Court discussed at length (pp. 484-486) the conference reports of the Congress to ascertain the intent of that legislative body. This Court (in quoting from the Cong. Globe, 42nd Cong. 1st. Session 800-801 said (pp. 485-6):

> "'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and township organizations, the mere instrumentality for the administration of state law.'"

Thus, the *rationale* of the municipality's immunity is based upon its existence as an instrumentality of the State. The State is therefore immune.

III.

THE PLAINTIFFS CAN NOT COLLATERALLY ATTACK A DECISION OF THE COURTS OF THE STATE OF ILLINOIS.

The petitioners urged in the District Court that the action of the State of Illinois, of which they complain, was judicial action of the Circuit Court of Cook County and the Supreme Court of Illinois. They contended that the judicial decision was a violation within the Fourteenth Amendment.

They have collaterally attacked said decision by filing the instant Civil Rights action. This collateral attack on a decision of this court is not permissible. *Kalb* v. *Feuerstein,* 308 U. S. 433, 60 S. Ct. 343 (1940); *Higginson* v. *Schoeneman,* 190 F. 2d 32 (C. A. D. C., 1951); *Bennett* v. *Hunter,* 155 F. 2d 223 (C. C. A. 10th Cir. (1946).

If petitioners' allegation of illegality is based upon the action of the courts, they should not have filed the instant action against the State of Illinois, but rather against the courts and the members thereof. Understandably, the plaintiffs did not seek this type of relief for they knew it was barred by law, *Harvey* v. *Sadler,* 331 F. 2d 387, (C. A. 9th Cir. 1964); *Puett* v. *City of Detroit,* 323 F. 2d 591 (C. A. 6th Cir. 1963); *Sires* v. *Cole,* 320 F. 2d 877 (C. A. 9th Cir., 1963); *Smith* v. *Dougherty,* 286 F. 2d 777 (C. A. 7th Cir., 1961) cert. dend. 368 U. S. 903.

Thus, they seek to do indirectly that which they are prohibited from doing directly.

The petitioners' attempted collateral attack on the decision of the courts of the State of Illinois is neither permissible nor lawful.

Conclusion

In view of the foregoing the respondent, the State of Illinois, respectfully prays that petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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